No. 08-1314

In the Supreme Court of the United States

DELBERT WILLIAMSON, ET AL., PETITIONERS

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act), 49 U.S.C. 30101 *et seq.*, or Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. 571.208, preempts a state common-law tort claim that an automobile manufactured in 1993 was defectively designed because it lacked a Type 2 (lap/shoulder) seatbelt in one of its seating positions.

2. Whether the Safety Act or FMVSS 208 preempts a state common-law tort claim that an automobile manufacturer should have warned consumers of the known dangers of a Type 1 (lap-only) seatbelt installed in one of the seating positions in one of its vehicles.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

Petitioners are the estate and survivors of Thanh Williamson. They filed this action against respondents Mazda Motor Corporation and Mazda Motor of America, Inc., the manufacturers of their minivan, alleging that respondents are liable under California common-law tort principles for Ms. Williamson's death from injuries sustained in a car accident. The state trial court granted respondents' demurrer on the ground that petitioners' state common-law tort suit is preempted by a federal regulation, Federal Motor Vehicle Safety Standard

(FMVSS) 208. The Court of Appeal of California affirmed, Pet. App. 1-27, and the Supreme Court of California denied discretionary review, *id.* at 31.

1. The National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act), now codified at 49 U.S.C. 30101 *et seq.*, requires the Secretary of Transportation to "prescribe motor vehicle safety standards," which are "minimum standard[s] for motor vehicle or motor vehicle equipment performance." 49 U.S.C. 30102(a)(9), 30111(a), see 49 U.S.C. 30101(1). The Secretary has delegated the authority to promulgate safety standards to the National Highway Traffic Safety Administration (NHTSA), an operating administration in the Department of Transportation (DOT). See 49 C.F.R. 1.50(a).

The Safety Act includes a savings clause, providing that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. 30103(e). Although the Safety Act also includes an express preemption provision, which precludes state and local governments from "prescrib[ing] or continu[ing] in effect" their own standards if those standards differ from an applicable FMVSS, 49 U.S.C. 30103(b)(1), this Court has held that the savings clause removes common-law tort actions from the scope of the express preemption clause. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 868 (2000).

This case concerns FMVSS 208, 49 C.F.R. 571.208, which is entitled "Occupant crash protection" and which "specifies performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. 571.208(S1). NHTSA issued the original version of FMVSS 208 in 1967, as part of the initial motor vehicle safety standards called for by the Safety Act. 32 Fed. Reg. 2408, 2421 (1967). Since its inception, FMVSS 208 has included a

requirement to install seatbelts in passenger cars. See *id.* at 2415.

FMVSS 208 refers to two different types of seatbelts. A Type 1 seatbelt is a lap-only seatbelt, "for pelvic restraint." 49 C.F.R. 571.209(S3). A Type 2 seatbelt is a lap and shoulder belt, "a combination of pelvic and upper torso restraints." *Ibid.* The first version of FMVSS 208 required that Type 2 seatbelts be installed for the driver's and right front passenger's seats, and that either Type 1 or Type 2 seatbelts be installed for all other seats. See 32 Fed. Reg. at 2415.

NHTSA has amended FMVSS 208 several times since 1967. At issue in this case is a requirement added in 1989 to specify the types of seatbelts required for rear seats. The 1989 amendments required manufacturers to install Type 2 (lap/shoulder) seatbelts in all "forward-facing rear outboard designated seating positions," but continued to allow manufacturers to install either Type 1 (lap-only) seatbelts or Type 2 (lap/shoulder) seatbelts in all non-outboard positions. 53 Fed. Reg. 47,982-47,993 (1988) (notice of proposed rulemaking) (NPRM), 54 Fed. Reg. 25,275-25,279 (1989) (final rule applicable to passenger cars), *id.* at 46,257-46,268 (1989) (final rule applicable to other vehicles, including the multipurpose passenger vehicle at issue here).

An "[o]utboard designated seating position" was defined as a seat less than 12 inches from the side interior wall of the vehicle. 49 C.F.R. 571.3(b) (1990). A "[r]ear outboard designated seating position," in turn, was defined as any such position "that is rearward of the front seat(s)," unless it is "adjacent to a walkway located between the seat and the side of the vehicle, which walkway is designed to allow access to more rearward seating positions." 49 C.F.R. 571.208(S4.2.4.1(b)) (standard

for light trucks and multipurpose passenger vehicles); accord 49 C.F.R. 571.208(S4.1.4.2(c)) (same, for passenger cars). Thus, under FMVSS 208 as amended in 1989, Type 2 seatbelts were not required in rear seats adjacent to a walkway or in rear center seats. This case involves a rear seat adjacent to a walkway.[1]

2. On August 14, 2002, the Williamson family, consisting of father Delbert, mother Thanh, and daughter Alexa, was traveling in a 1993 Mazda MPV minivan, which FMVSS 208 treats as a multipurpose passenger vehicle. Pet. App. 3, see 49 C.F.R. 571.3(b) (1990). The Mazda MPV has three rows of seats: the front row, with physically separate seats for the driver and a front passenger, the middle row bench, with two seats and an aisle on the right-hand side that allows access to the last row, and the last row bench, with three seats. Delbert was driving and wearing a Type 2 (lap/shoulder) seatbelt. Alexa was sitting directly behind him in the middle-row left outboard seat of the vehicle, also wearing a Type 2 seatbelt. Thanh was sitting in the middle row to Alexa's right. Because that seat was adjacent to the aisle, it was a "non-outboard rear seating position" under FMVSS 208. Thanh wore the Type 1 (lap-only) seatbelt installed by Mazda in that seating position, as FMVSS 208 permitted at the time. Pet. App. 3.

The Williamsons' vehicle collided with another vehicle, and Thanh sustained fatal injuries. Pet. App. 3.

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[1] The standard at issue in this case is no longer in effect for new cars. In response to a congressional directive, see Anton's Law § 5, 49 U.S.C. 30127 note, NHTSA revised its rule to require all passenger cars and multipurpose passenger vehicles with a gross vehicle weight rating of 10,000 pounds or less, if manufactured on or after September 1, 2007, to include Type 2 seatbelts at all rear designated seating positions that face forward. 49 C.F.R. 571.208(S4.1.5.5) and (S4.2.7.1).

Petitioners allege that "the forces generated by th[e] collision caused [Thanh's] body to 'jackknife' around her defective lap[ ]belt, causing severe abdominal injuries and internal bleeding." *Ibid.* (first and third brackets in original).

3. Petitioners sued respondents in California state court, asserting state common-law tort claims. As relevant here, they alleged that the 1993 Mazda MPV was defective because respondents should have installed a Type 2 seatbelt in Thanh's seating position. They also alleged that respondents had failed to provide adequate warnings of the known hazards, risks, and dangers of the Type 1 seatbelt installed in Thanh's seating position. Pet. App. 4. Respondents filed a demurrer on the ground that federal law preempted those tort claims. *Id.* at 5.

The trial court sustained the demurrer. The court held that federal law precluded a state law tort action "to the extent [the] theory of liability [was] the lap[-] only seat belt." Pet. App. 4 (brackets in original). The court noted that its ruling did not preclude petitioners from stating a cause of action for "negligen[ce] in how you hooked [the seatbelt] up or negligen[ce] in how you design the seat that was going to accommodate it, or any other tort theory." *Id.* at 5 (first and third brackets in original). Petitioners stated to the trial court, however, that they were "left with nothing" if federal law preempted their challenge to the type of seatbelt respondents installed in Thanh's seating position. *Id.* at 6. The parties then stipulated to dismiss petitioners' remaining claims with prejudice. *Ibid.*

4. The Court of Appeal of California affirmed. Pet. App. 1-27.

a. With respect to petitioners' design-defect claim, the state appellate court's analysis of the preemption issue focused on this Court's decision in *Geier*, *supra*. This Court held in *Geier* that an earlier version of FMVSS 208 preempted common-law tort claims that manufacturers should have equipped vehicles with driver's-side airbags. At issue was the 1984 amendment to FMVSS 208, see 49 Fed. Reg. 28,962-29,010 (1984), which required manufacturers to equip some vehicles with passive restraints. Passive restraints are devices—such as airbags or automatic seatbelts—the effectiveness of which does not depend on any action by the vehicle occupants. The 1984 regulation provided that, after a phase-in period, manufacturers could choose either to install airbags or to install other forms of passive restraints.

This Court held that FMVSS 208 conflicted with a suit alleging that a common law duty of care required installation of airbags and, therefore, preempted the suit under ordinary principles of conflict preemption. 529 U.S. at 874 886.[2] The Court explained that DOT, in promulgating FMVSS 208, "deliberately sought variety—a mix of several different passive restraint systems." *Id.* at 878. For local tort law to provide that a manufacturer's choice to install passive restraints other than airbags amounted to negligence, the Court reasoned, "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881.

In this case, the state appellate court acknowledged that *Geier* was "distinguishable because it dealt with

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[2] The Court rejected the contention that the savings clause forbids the application of ordinary conflict preemption principles. 529 U.S. at 869 874.

passive restraints, not seatbelts." Pet. App. 15, accord *id.* at 23. But the court found "persuasive" the reasoning of several lower-court decisions applying *Geier*'s reasoning to cases involving Type 1 seatbelts. *Id.* at 24. Those decisions concluded that FMVSS 208 reflected "NHTSA's decision to allow car manufacturers the option to install either lap-only or lap/shoulder seat belts" at the relevant seating positions—*i.e.*, "the same policy concerns . . . identified in *Geier*." *Id.* at 16, 18 (quoting *Curden* v. *General Motors Corp.*, 509 F.3d 227, 231 (5th Cir. 2007), cert. denied, 128 S. Ct. 2911 (2008), and *Roland* v. *General Motors Corp.*, 881 N.E.2d 722, 727 (Ind. Ct. App.), transfer denied, 898 N.E.2d 1218 (Ind. 2008) (Table)). Following the reasoning of those decisions, the court of appeal held that accepting petitioners' claim "would bar motor vehicle manufacturers from employing one of the passenger restraint options authorized by FMVSS 208," and that petitioners' claim therefore is preempted as "an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208." *Id.* at 23 (citation omitted; brackets in original).

b. The court of appeal also affirmed the dismissal of petitioners' other claims, including their failure-to-warn claim. Pet. App. 25-27. The court held that petitioners had "waived these claims" through both their stipulation and their concessions in the trial court that they could not pursue any of their claims related to Thanh Williamson's death without the ability to challenge respondents' decision to install a Type 1 seatbelt in Thanh's seating position. *Id.* at 25. The court further noted that those other claims were "also barred by federal preemption." *Id.* at 26.

5. The Supreme Court of California denied petitioners' petition for review. Pet. App. 31.

DISCUSSION

The decision below is at odds with the regulatory history of FMVSS 208 and the government's longstanding position on the preemption of state common-law tort suits by Federal Motor Vehicle Safety Standards that set only minimum standards. In reaching its conclusion, the decision below gave too broad a reading to this Court's decision in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000). Several other lower courts, both federal and state, have similarly misinterpreted *Geier*, and that recurring error has led to conflicts regarding the preemptive effect of other aspects of the FMVSS (although there is not yet a square disagreement over the precise factual scenario presented here, *i.e.*, a decision not to install a Type 2 seatbelt). The lower courts' methodological error is important: it effectively deprives the Safety Act's savings clause of its proper effect; it transforms the FMVSS from a minimum standard into a definitive standard of care; and it does so contrary to the consistent position of the agency that promulgated the standards, as repeatedly expressed in the government's briefs to this Court beginning in 1990. In the government's view, therefore, the first question presented is sufficiently important and recurring to warrant this Court's review.

The state appellate court's disposition of the second question presented rests on the adequate and independent state-law ground of waiver. This Court therefore should grant the petition only as to the first question presented.

A. The Decision Below Misreads *Geier* And Misinterprets The Preemptive Effect Of FMVSS 208

The state appellate court characterized FMVSS 208 as giving manufacturers the "option" of installing either Type 1 or Type 2 seatbelts at any position for which a Type 2 seatbelt was not expressly required. Pet. App. 16 (citation omitted). As a result, the court held that state tort law is preempted under *Geier* when the state law imposes liability for choosing the less protective option. The state court's reading of *Geier* is incorrect. A Federal Motor Vehicle Safety Standard is a "minimum standard." 49 U.S.C. 30102(a)(9). Accordingly, a state common-law duty of care that effectively sets a higher minimum does not create a conflict with federal law, in the absence of specific features of a particular FMVSS that go beyond establishing a minimum standard. *Geier* held the local negligence-law duty of care preempted because the FMVSS at issue there did more than set a minimum standard. Rather, that FMVSS affirmatively encouraged the adoption of diverse forms of passive restraints, and state tort law could not be permitted to counter that encouragement by requiring that all manufacturers select the same form of passive restraint (airbags). Where, as in this case, a FMVSS manifests no affirmative intent to foster multiple options, there is no conflict of the sort that was present in *Geier*—and hence no preemption.

1. As this Court stated in *Geier*, "DOT's own contemporaneous explanation of FMVSS 208 makes clear that the 1984 version of FMVSS 208 reflected the following significant considerations": (1) "buckled up seatbelts are a vital ingredient of automobile safety", (2) "despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder

belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled"; (3) "airbags could make up for the dangers caused by unbuckled manual belts, but they could not make up for them entirely"; (4) "passive restraint systems had their own disadvantages, for example, the dangers associated with, intrusiveness of, and corresponding public dislike for, nondetachable automatic belts"; (5) "airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars"; (6) "airbags were expected to be significantly more expensive than other passive restraint devices, raising the average cost of a vehicle price $320 for full frontal airbags over the cost of a car with manual lap and shoulder seatbelts (and potentially much more if production volumes were low)," and "the agency worried that the high replacement cost [of airbags]—estimated to be $800—could lead car owners to refuse to replace them after deployment"; and (7) "the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices." *Geier*, 529 U.S. at 877-878.

Because of the confluence of these factors, in the 1984 amendment to FMVSS 208, NHTSA phased in the passive-restraint requirement and deliberately allowed manufacturers to choose among several types of passive restraints, so that a variety of passive restraints would be available on the market. NHTSA specifically had rejected a proposed "all airbag" standard because of safety concerns, arising partly from the potential for a public backlash to an airbag mandate. *Geier*, 529 U.S. at 879. As this Court explained, NHTSA concluded that allowing manufacturers to choose among passive re-

straints "would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. And it would thereby build public confidence." *Ibid.* (citing 49 Fed. Reg. at 28,990, 29,001-29,002).

2. The history of the 1989 amendments to FMVSS 208 at issue in this case reflects a manifestly different set of agency calculations.

The original 1967 version of FMVSS 208 required manufacturers to install either Type 1 or Type 2 seatbelts for all rear passenger seating positions. See 32 Fed. Reg. at 2415. In 1984, NHTSA denied a petition for rulemaking to require Type 2 seatbelts for all passenger cars' rear *outboard* seating positions. 49 Fed. Reg. at 15,241-15,242; see also 53 Fed. Reg. at 47,982. The petition for rulemaking had sought such a rule primarily to facilitate the use of a type of booster seat for children that was held in place by Type 2 seatbelts (rather than by tethers, which at the time were more widely used to secure child restraints), although the petition also noted that adult passengers could benefit from Type 2 seatbelts in rear outboard seating positions. 49 Fed. Reg. at 15,241. Rejecting the proposal, NHTSA stated that "child restraint systems and child booster seats equipped with tethers offer greater protection for children when those tethers are attached than when those seats and systems are held in place by Type 2 belts." *Ibid.* Further, although NHTSA agreed with the view that "Type 2 belts in rear seats might give some added degree of protection to adults," the agency concluded that "the benefits, if any, to be gained by replac-

ing the Type 1 belts with Type 2 belts for adults would not justify the additional cost." *Id.* at 15,241-15,242.

In 1988, NHTSA issued an NPRM revisiting its earlier decision concerning Type 2 seatbelts in rear seating positions. 53 Fed. Reg. at 47,982-47,993. The agency proposed what would become the 1989 amendments to FMVSS 208, requiring Type 2 seatbelts in all rear *outboard* seating positions in (*inter alia*) passenger cars and multipurpose passenger vehicles. *Id.* at 47,982. In the 1988 NPRM and the subsequent final rules, NHTSA explained the main reasons for its change in position since 1984. First, more people had begun to use rear seatbelts, primarily because of new state seatbelt laws. *Id.* at 47,983. Second, rear-seat Type 2 seatbelts were "even more effective" in reducing the risk of death than Type 1 seatbelts, and NHTSA expected that greater effectiveness to result in "progressively greater safety benefits" as more rear-seat occupants used their seat belts. 54 Fed. Reg. at 25,276 (final rule applicable to passenger cars); *id.* at 46,257-46,258 (final rule applicable to other vehicles). Third, many manufacturers had voluntarily installed Type 2 seatbelts in rear outboard seats, and as a result, the cost of requiring all manufacturers to do so had diminished substantially. *Id.* at 46,258. Fourth, child restraint systems had shifted away from those requiring a tether anchor. NHTSA determined that Type 2 seatbelts would "offer benefits for children riding in some types of booster seats, would have no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts, and would offer older children the same incremental safety protection" as adults. 53 Fed. Reg. at 47,988-47,989; see *id.* at 47,983; 54 Fed. Reg. at 25,276.

The 1988 NPRM also explained why NHTSA had decided not to propose requiring manufacturers to install Type 2 seatbelts for rear *inboard* seating positions. The agency stated that there would be "more technical difficulties" associated with installing Type 2 seatbelts in rear inboard seating positions than in rear outboard seating positions. 53 Fed. Reg. at 47,984. Additionally, regardless of the technical difficulties, such a requirement would yield "small safety benefits and substantially greater costs." *Ibid.* The agency acknowledged that "some aisle seating positions," such as the one at issue in this case, "may not be covered by [the] proposed requirement" to install Type 2 seatbelts, as "the seating positions next to the aisle on the right hand side of many passenger vans • • • may *not* be outboard seating positions, because they may be more than 12 inches from the inside of the vehicle." *Id.* at 47,985.

In adopting its final rule amending FMVSS 208 for multipurpose passenger vehicles, NHTSA reemphasized its rationale for not requiring Type 2 seatbelts in rear inboard seats. 54 Fed. Reg. at 46,257-46,268. The agency stated that no commenters had "presented any new data that would cause the agency to change its tentative conclusion," enunciated in the 1988 NPRM, that requiring Type 2 seatbelts in rear inboard positions would be "technical[ly] difficult[]" and "would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." *Id.* at 46,258.

NHTSA also stated in its final rule release that it had decided not to require Type 2 seatbelts for rear seating positions adjacent to an aisle, regardless whether those seats were technically "outboard" seats—*i.e.*, less than 12 inches from the side wall of the vehicle.

54 Fed. Reg. at 46,258. The agency "did not mean to suggest" that the FMVSS would require manufacturers to install shoulder belts "at seating positions where they would obstruct an aisle designed to give access to rear seating positions." *Ibid.* Significantly, however, NHTSA also stated that, "[o]f course, in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with the aisleway's purpose of allowing access to more rearward seating positions, NHTSA encourages the manufacturers to do so." *Ibid.*

Thus, in its final rule, NHTSA was not seeking to promote safety by encouraging variety in seatbelt design or fostering a mix of Type 1 and Type 2 seatbelts. To the contrary, NHTSA showed a clear preference for Type 2 seatbelts and even encouraged manufacturers to install them for inboard seating positions adjacent to an aisle (the type of seat at issue in this case). The reasons why NHTSA did not mandate Type 2 seatbelts at those positions pertained to its assessment at the time of the technological difficulties, costs, and benefits of such a requirement.

That reasoning stands in sharp contrast to the agency's reasoning with respect to airbags and other passive restraints, discussed in *Geier*. There, the agency affirmatively wished to provide for and encourage several options for passive restraints, to help achieve the ultimate purpose of the regulation—the reduction of highway deaths and injuries through the installation of passive restraints. That purpose of promoting safety by fostering a variety of passive restraint devices would have been frustrated by a state common-law duty to install airbags in all vehicles. Here, by contrast, NHTSA simply set a minimum standard of Type 1 seatbelts for

rear inboard and aisle seats, based on its assessment at the time of technical feasibility and cost-benefit analyses (which are common to virtually all NHTSA rulemakings setting an FMVSS), while still encouraging manufacturers to install Type 2 seatbelts in those seats. Thus, the existence of the purported "option" was simply the by-product of NHTSA's setting of a minimum standard.

Manufacturers always have the "option" of exceeding a minimum safety standard when NHTSA has decided not to mandate a more stringent alternative because of considerations of cost or feasibility—as NHTSA did in this case and, indeed, often does in considering regulatory alternatives. But if such an "option" alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined. *Geier* does not mandate that result, because it determined that under the Safety Act, common-law tort actions may proceed unless they conflict with a FMVSS, and here, there is no conflict.

3. The government has consistently maintained that a minimum safety standard provided in a FMVSS, without more, does not conflict with a stricter state requirement. As this Court explained in *Geier*, because DOT has a "thorough understanding of its own regulation and its objectives" and a "unique[]" perspective on whether state requirements conflict with federal standards, "the agency's own views should make a difference" in the conflict-preemption analysis. 529 U.S. at 883 (citation omitted); accord, *e.g.*, *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1201 (2009) (noting that agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle'"); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 67-68 (2002); see also

Bates v. *Dow Agrosciences LLC*, 544 U.S. 431, 455 (2005) (Breyer, J., concurring). The reasoning of the decision below conflicts with the consistent position of the United States, expressed in three amicus briefs filed in this Court beginning in 1990. Those briefs maintained that a FMVSS permitting a manufacturer to choose among different options consistent with a minimum standard does not alone preempt state common-law tort claims seeking to impose liability for selecting one option instead of another.

In its brief in *Wood* v. *General Motors Corp.*, 494 U.S. 1065 (1990), submitted at this Court's invitation, the United States stated that "the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted." U.S. Amicus Br. at 15, *Wood*, *supra* (No. 89-46). The United States reiterated that position in its amicus brief in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), which stated that the government did "not agree" with the "broader theory of implied preemption" that some lower courts had advanced—"*i.e.*, that the existence of 'options' to comply with [FMVSS] 208 in itself precludes state court judgments based on the failure to install one particular option." U.S. Amicus Br. at 29 n.16, *Freightliner Corp.*, *supra* (No. 94-286). And the United States' amicus brief in *Geier* itself echoed that position: "We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose." U.S. Amicus Br. at 21 n.18, *Geier*, *supra* (No. 98-1811). See also *Geier*, 529 U.S. at 883 ("DOT has explained FMVSS 208's objec-

tives, and the interference that 'no airbag' suits pose thereto, consistently over time.").

B. The Decision Below Perpetuates Lower Courts' Misreading Of *Geier* And Warrants Plenary Review

At present there is not a square conflict among federal courts of appeals or state courts of last resort on the question whether FMVSS 208 preempts claims challenging a manufacturer's decision not to install a Type 2 seatbelt. The appellate courts that have addressed that question have adopted the same erroneous reading of *Geier* discussed above. In the government's view, however, this Court's review is warranted, for two reasons. First, the question presented is significant and recurring. The lower courts repeatedly have over-read a decision of this Court to hold that a federal regulation preempts state law, even though the federal agency that promulgated and administers that regulation disagrees. And the dispute between the courts and the federal department that promulgated FMVSS 208 concerns a nationally important issue: the standards of care that govern the design and manufacture of motor vehicles. Second, the lower courts are currently in conflict on how to apply the reasoning of *Geier* to claims of FMVSS preemption generally. This Court need not and should not postpone addressing this broad methodological issue until a square conflict develops over the preemptive effect of a particular provision of a particular FMVSS applicable to a particular class of vehicles.

1. The decision below follows decisions of two federal courts of appeals and several intermediate state courts in finding that the 1989 amendments to FMVSS 208 preempt state common-law tort actions concerning the installation of Type 1 seatbelts. See *Carden* v. *Gen-*

eral Motors Corp., 509 F.3d 227, 231 (5th Cir. 2007), cert. denied, 128 S. Ct. 2911 (2008); *Griffith* v. *General Motors Corp.*, 303 F.3d 1276, 1281-1282 (11th Cir. 2002), cert. denied, 538 U.S. 1023 (2003); *Roland* v. *General Motors Corp.*, 881 N.E.2d 722, 729 (Ind. Ct. App.), transfer denied, 898 N.E.2d 1218 (Ind. 2008) (Table); *Heinricher* v. *Volvo Car Corp.*, 809 N.E.2d 1094, 1098 (Mass. App. Ct.), review denied, 815 N.E.2d 1085 (Mass. 2004) (Table); see also *Hurley* v. *Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000) (Type 1 seatbelt installed in driver's seat of bus), cert. denied, 531 U.S. 1148 (2001). Those decisions interpreted the history of FMVSS 208 as showing that NHTSA "decided to leave manufacturers the option to select between lap-only and lap-shoulder belts" in rear inboard seating positions. *Carden*, 509 F.3d at 231; accord *Griffith*, 303 F.3d at 1282 (suit over Type 1 seatbelt preempted because it "would foreclose an option specifically permitted by FMVSS 208"); *Roland*, 881 N.E.2d at 729 ("The present case • • • involves a choice made available as part of the comprehensive regulatory action expressed in FMVSS 208."); *Heinricher*, 809 N.E.2d at 1098 ("[T]he preemptive effect of Standard 208 • • • encompasses the two alternative manual restraint systems at issue here. • • • Federal law plainly provided Volvo Car Corporation with the option of installing *either* a two-point lap belt *or* a three-point lap-shoulder harness in the rear center seat of its vehicles.").

As discussed above, however, NHTSA disagrees with those courts' characterization of its rulemaking. The government's briefs to this Court have consistently explained that NHTSA's decision to allow options, standing alone, does not compel a finding of preemption. See pp. 15-17, *supra*. Rather, in cases like this one, the

FMVSS contemplates several ways of meeting the federal minimum standard. But without more (such as the emphasis on diversity of solutions discussed in *Geier*), the States are not foreclosed from concluding, through a duty of care applied in common-law tort actions, that one option is superior to the others. Given the "technical" and "complex" nature of this regulatory framework, *Geier*, 529 U.S. at 883, there is a significant risk that the lower courts' mistaken understanding of the regulatory purpose will be self-perpetuating. See, *e.g.*, *Roland*, 881 N.E.2d at 727 (relying on *Carden*, *Heinricher*, and *Griffith*); *Carden*, 509 F.3d at 231 (relying on *Griffith*).

Moreover, the issue remains significant. NHTSA estimates that in 2008, approximately 1,040,438 vehicles in the United States were equipped with some Type 1 seatbelts, any one of which could potentially become the subject of a tort suit like this one. Thus, although all motor vehicles manufactured today with a gross vehicle weight rating of 10,000 pounds or less are required to have Type 2 seatbelts at seating positions like the one at issue in this case, see note 1, *supra*, the preemptive effect of FMVSS 208 on claims involving older vehicles remains sufficiently important to warrant this Court's review. Analogously, this Court granted review in *Geier* although by that time the question presented no longer affected new cars: NHTSA had already required passenger cars to include front-seat airbags, beginning with the 1998 model year. See 49 C.F.R. 571.208(S4.1.5.3).[3]

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[3] Although this case involves the use of a Type 1 seatbelt in an aisle seat rather than a true center seat, respondents do not contend in their brief in opposition that this fact makes any pertinent difference to the preemption analysis. See, *e.g.*, Br. in Opp. i, 22-23 (describing the issue in this case as pertaining to the "rear center seat").

2. The analytical question presented by this case—how to apply *Geier*'s reasoning to FMVSS provisions that do not affirmatively seek to foster a diversity of options—has already produced conflicts in the lower courts, even though not in the precise circumstances presented here. Thus, for instance, lower courts have reached conflicting conclusions on how to apply *Geier* to FMVSS 205, 49 C.F.R. 571.205, which allows manufacturers to use either tempered or laminated glass in vehicle side windows. Some courts have held that FMVSS 205 does not conflict with a state common-law duty of care requiring installation of laminated glass. See, *e.g.*, *O'Hara* v. *General Motors Corp.*, 508 F.3d 753, 762-763 (5th Cir. 2007);[*] *MCI Sales & Serv., Inc.* v. *Hinton*, 272 S.W.3d 17, 29 (Tex. Ct. App. 2008), review granted, No. 09-0048 (Tex. argued Mar. 24, 2010). Other courts have concluded that FMVSS 205 gives manufacturers the "option" to install either tempered or laminated glass, and that state common law may not penalize choosing either one. See, *e.g.*, *Morgan* v. *Ford Motor Co.*, 680 S.E.2d 77, 94-95 (W. Va. 2009); *Lake* v. *Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 WL 891867, at *6-*9 (Tenn. Ct. App. Mar. 15, 2010). Similarly, lower courts have reached conflicting conclusions on whether the absence in FMVSS 208 of any requirement of passenger seatbelts in buses preempts common-law requirements to install such seatbelts. Compare *MCI Sales & Serv.*, 272 S.W.3d at 23-28 (common-law claim not preempted), with *Lake*,

[*] The Fifth Circuit decided *O'Hara* only weeks before a different panel decided *Carden*, which concluded that FMVSS 208 did have preemptive effect on facts like those here. *Carden* did not cite *O'Hara*'s interpretation of *Geier* or its discussion of the preemptive effect of the availability of options unde a FMVSS.

2010 WL 891867, at *9-*11 (common-law claim impliedly preempted), and *Doomes* v. *Best Transit Corp.*, 890 N.Y.S.2d 526, 527 (App. Div. 2009) (same).

Even those courts that have read *Geier* to require preemption under such circumstances have noted the need for further guidance from this Court. See, *e.g.*, *Morgan*, 680 S.E.2d at 94 ("We discern that we are stuck between a rock and a jurisprudential hard place. * * * *Geier* is flawed because it requires courts to * * * divine an agency's interpretation from extraneous materials to determine the preemptive effect of a regulation. * * * [But] *Geier* is, until altered or explicated by [this] Court, the guiding law of the land."); accord *Lake*, 2010 WL 891867, at *7.

Review by this Court is therefore warranted even in the absence of a conflict among decisions of federal courts of appeals and state high courts concerning the preemptive effect of the particular feature of FMVSS 208 at issue here. The acknowledged confusion and, in the government's view, widespread error in the lower courts over the decade since *Geier* are of sufficient importance to warrant plenary review of the first question presented. Moreover, given the opposing views of the responsible agency and a number of lower courts, further percolation is not necessary for this Court to have the full benefit of the opposing perspectives on the preemptive effect of FMVSS 208.

C. This Court Lacks Jurisdiction To Review Petitioners' Failure-To-Warn Claim

This Court lacks jurisdiction to consider "a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the

judgment." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). The state appellate court held that petitioners waived their failure-to-warn claim. See Pet. App. 25. That holding was based on state procedural requirements, and petitioners have not offered any reason to conclude that those requirements are not both independent and adequate to support the dismissal.[5] Therefore, this Court lacks jurisdiction to review the second question presented.

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[5] Although the state court briefly addressed the merits of the preemption question in the alternative, see Pet. App. 26, that discussion does not detract from the adequacy of the state-law ground. *See, e.g.*, *Sochor* v. *Florida*, 504 U.S. 527, 533 (1992) (citing *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983)).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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